UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
GEORGIA AUGUSTA DIVISION

THE STATE OF GEORGIA, et al., *Plaintiffs*, ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC. and ASSOCIATED BUILDERS AND CONTRACTORS, INC., *Plaintiff-Intervenors,* v. JOSEPH R. BIDEN in his official capacity as President of the United States; et al., *Defendants*.	Case 1:21-cv-00163-RSB-BKE

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE BY ASSOCIATED BUILDERS AND CONTRACTORS, INC. AND ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC.

COMES NOW ASSOCIATED BUILDERS AND CONTRACTORS, INC. and ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC. ("ABCGA" collectively "ABC"), by and through undersigned counsel, and submits this Memorandum of Law in support of their Motion to Intervene as Co-Plaintiffs in the above-captioned lawsuit.

Pursuant to Federal Rule of Civil Procedure 24, the Associated Builders and Contractors of Georgia, Inc. (the "Proposed Intervenors") have moved to intervene as

a matter of right, or in the alternative, with the Court's permission, as plaintiffs in the above-captioned lawsuit.

I. FACTUAL BACKGROUND

A. The Proposed Intervenors.

ABCGA represents the interests of hundreds of member construction contractors and related firms from all over Georgia, who perform work in this state and district and throughout the country.[1] ABCGA is a chartered chapter of Associated Builders and Contractors, Inc. ("ABC"), a nationwide construction industry trade association representing more than 21,000 members, many of whom regularly perform federal contracts covered by the new mandate.[2] ABC's membership represents most specialties within the construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.[3] ABC represents many private businesses that regularly bid on and are awarded federal government contracts of the type covered by the unprecedented vaccination mandates imposed by Executive Order 14042, as implemented by the Safer Federal Workforce Task Force Guidance, the Office of Management and Budget, and the Federal Acquisition Regulatory Council, all of which are being challenged in the above-captioned litigation.[4]

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[1] Declaration of Bill Anderson, Par. 2, (attached hereto). We will refer to the two Plaintiffs-Intervenors as ABC for the rest of the brief.

[2] Declaration of Bill Anderson, Par. 3.

[3] Declaration of Bill Anderson, Par. 2.

[4] Declaration of Bill Anderson, Par. 4.

ABC seeks to intervene on behalf of itself and its many hundreds of members who will be directly harmed if the challenges to Executive Order 14042 and the implementing orders, guidance, and regulations, are not successful. The specific interests of the Proposed Intervenors supporting their intervention are explained in detail below.

B. Executive Order 14042 and Its Potential Consequences.

1. On September 9, 2021, President Biden signed Executive Order 14042, titled Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors ("EO 14042"), a true and accurate copy is found at Doc. 1-1, (Exhibit A).

2. At its core, the mandate forces contractors to make an impossible choice: either (1) take enforcement action that may include termination of all unvaccinated employees, or (2) face losing billions of dollars in federal funding. And because the administration has already amended the guidance multiple times, there is no telling what other onerous obligations may put contractors in breach at a moment's notice.

3. EO 14042 purports to "promote economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provides adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instruments." EO 14042 is found at Doc. 1-1 at 1 Exhibit A. The EO contains no support for this claim, which is contrary to record evidence.

4. EO 14042 directs executive agencies subject to the Federal Property and Administrative Services Act (the "Procurement Act") to include in all federal

contracts and "contract-like instruments" a clause that contractors and subcontractors will comply with all future guidance issued by the Task Force.

5. EO 14042 required the Task Force issue specific COVID safety protocols by September 24, 2021.

6. On September 24, 2021, the Task Force released its COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors (the "Task Force Guidance") to federal agencies, imposing a vaccine mandate on federal contractors and subcontractors, a true and accurate copy is found at Doc. 1-2, (Exhibit B).

7. EO 14042 further required the Director of OMB publish a determination in the Federal Register as to "whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors." Doc. 1-1 at 2.

8. On September 28, 2021, Director Young published the OMB's Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042 (the "OMB Determination") stating in conclusory fashion "I have determined that compliance by Federal contractors and subcontractors with the COVID-19-workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed. Reg. 53,691 (Sept. 28, 2021), a true and correct copy is found at Doc. 1-3, (Exhibit C).

9. The OMB Determination contained no research or data in support of its claims. Moreover, the OMB Determination underwent no notice-and-comment period.

10. Through EO 14042 and without legislative intervention, the President purported to give the Task Force, the OMB Director, and various federal agencies broad authority to impose vaccine mandates on federal contractors.

11. While EO 14042 did not specifically call for a vaccine mandate, it did purport to delegate rulemaking authority to the Task Force, OMB, and the Federal Acquisition and Regulatory Council (the "FAR Council").

12. On September 30, 2021, the FAR Council issued Class Deviation Clause 252.223-7999 (the "FAR Deviation Clause") with accompanying guidance, a true and correct copy is found at Doc. 1-4, (Exhibit D).

13. The FAR Deviation Clause requires federal contractors to follow the Task Force Guidance and any future amendments to the Guidance. Doc. 1-4

14. EO 14042, the Task Force Guidance, the FAR Deviation Clause, and the OMB Determination are hereinafter collectively referred to as the "Contractor Mandate."

15. Ultimately, the Task Force Guidance was never published to the Federal Register for the purpose of receiving public comment.

16. Pursuant to the Task Force Guidance, "[p]eople are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a

two-dose series, or two weeks after they have received a single-dose vaccine." Doc. 1-2 at 4.

17. The Guidance further establishes that "covered contractor employees" are to be "fully vaccinated" by December 8, 2021—meaning said employees must obtain the final dose of their vaccine of choice no later than November 24, 2021. Defendant have changed the deadline to January 18, 2022 (Doc. 39 at 3) and covered employees have to take the first shot of Pfizer or Moderna no later than December 7, 2021.

18. Accordingly, any covered contractor employee inclined to take the Moderna vaccine would have had to receive their first dose by October 27, 2021, in order to comply with the December 8, 2021, deadline.[5] With the deadline for a Moderna vaccine having passed, covered contractor employees must obtain a Pfizer vaccine by November 3, 2021[6] or a Johnson and Johnson vaccine by November 24, 2021[7]. Even with the deadline change to January 18, 2022, the first vaccine of Pfizer or Moderna needs to be taken no later than December 7, 2021.

19. Pursuant to the Task Force Guidance, "covered contractor employees" refers to "any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace.

[5] Center for Disease Control, Different COVID-19 Vaccines, (Oct. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html.

[6] Id.

[7] Id.

This includes employees of covered contractors who are not themselves working on or in connection with a covered contract." Doc. 1-2 at 3–4 (emphasis added).

20. For the same reason, the Guidance also specifies that subcontractors working in a covered workplace must also be fully vaccinated. Doc 1-2 at 1.

21. Pursuant to the Task Force Guidance, a contractor or subcontractor workplace location "means a location where covered contract employees work, including a covered contractor workplace or Federal workplace." Doc. 1-2. B at 3.

22. Pursuant to the Task Force Guidance, "unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance," employees in other areas of the building site or facility are also a part of the covered contractor workplace.

23. Accordingly, the Contractor Mandate mandates vaccination for those who work both directly and indirectly with federal contracts.

24. For example, pursuant to the Task Force Guidance, if a covered contractor employee is working on a contract for the Department of Defense in a remote office facility and that person merely shares a parking garage with non-contracted employees once a week, those non-contracted employees are subject to the Contractor Mandate.

25. In another example, pursuant to the Task Force Guidance, if a covered contractor employee is working on a contract for NASA in a remote office facility and

that person merely shares an elevator with non-contracted employees every other Friday, those non-contracted employees are subject to the Contractor Mandate.

26. The Task Force Guidance imposed a deadline of October 15, 2021, for federal agencies to include a vaccination mandate clause in new contracts.

27. EO 14042, in general terms, and the Task Force Guidance, in specific terms, further required that the Federal Acquisition Regulatory Council ("FAR Council") "conduct a rulemaking to amend the [Federal Acquisition Regulation ("FAR")] to include the [Contractor Mandate]." Doc. 1-2 at 12.

28. Pursuant to the Task Force Guidance, by October 8, 2021, and prior to any rulemaking, the FAR Council was required to develop a recommended contract clause to impose the Contractor Mandate for federal agencies to include in their subsequent contracts. Doc. 1-2 at 12.

29. The Task Force Guidance instructed the FAR Council to "recommend that agencies exercise their authority to deviate from the FAR" by using a vaccination mandate clause in contracts prior to the FAR Council actually amending the FAR. Doc. 1-2 at 12.

30. Plaintiffs-Intervenors ABC strongly support and encourage vaccination of construction workers, and many ABC member companies have made significant efforts through outreach and incentives to get as many workers as possible vaccinated.[8] But a sizable percentage of construction workers, as with the population

[8] Declaration of Bill Anderson, Par. 4.

as a whole, resist compulsory vaccination and have indicated they will quit their employment rather than submit to mandatory vaccination.[9]

31. The broad application of the Contractor Mandate is expected to severely and irreparably impact each ABC company seeking to perform work on federal contracts or subcontracts in that any of their unvaccinated employees must be terminated or reallocated to uncovered workplaces lest they risk breaching their federal contracts by failing to fully comply with the Contractor Mandate.

32. The Contractor Mandate, therefore, forces ABC member companies to choose between two equally problematic outcomes: (1) maintain a fully vaccinated (but reduced) workforce of covered employees by removing or suffering the resignations of those who are unvaccinated and risk breaching the contracts by not satisfactorily performing due to lack of qualified workers; or (2) breach the contract by continuing to employ unvaccinated, covered employees so that they can timely perform and complete the contract requirements.[10] Either way, ABC companies face a risk of breach and material noncompliance for reasons totally beyond their control.[11]

The Contractor Mandate fails to distinguish between contractors and subcontractors or between low-risk and higher risk industries, or between small and large contractors or subcontractors in the implementation of the Mandate. Many ABC

[9] Declaration of Bill Anderson, Par. 9.

[10] Declaration of Bill Anderson, Par. 9.

[11] Declaration of Bill Anderson, Par. 9.

member contractors are small businesses who lack the resources to implement the Mandate. They nevertheless perform work that has been deemed essential by OSHA and the CDC at relatively low risk to construction workers. But as a result of the Contractor Mandate, many of ABC's member contractors cannot bid for or perform federal construction contracts or subcontracts.

II. ARGUMENT

A. The Proposed Intervenors Are Entitled to Intervene as a Matter of Right.

Rule 24 provides two avenues for a nonparty to intervene in a lawsuit; intervention as of right and intervention with permission of the court. A nonparty claiming to have a right to intervene may invoke Rule 24(a), which applies "when a statute of the United States confers an unconditional right to intervene," or "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a); see also *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); *Bayshore Ford Trucks Sales, Inc. v. Ford Motor Co. (In re Ford Motor Co.)* 471 F.3d 1233 (11th Cir. 2006).

In the Eleventh Circuit, a party seeking to intervene as of a right must: 1) timely move to intervene; 2) show that it has an interest relating to the subject matter of the suit; 3) show that its ability to protect that interest may be impaired or impeded by the disposition of the suit; and 4) show that the existing parties to the suit cannot

adequately represent that interest. See *Georgia v. United States Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002). If a party meets each of these four requirements, the court must allow it to intervene. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); *Omni Healthcare, Inc. v. Health First, Inc.*, 2017 U.S. Dist. LEXIS 136992 (M.D. Fla. 2017). Moreover, "[a]ny doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Fed. Savings and Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

1. *The Proposed Intervenors' Motion to Intervene is Timely.*

Intervention as of right requires a motion be "timely" filed, but Rule 24 does not lay out actual time limits. Fed. R. Civ. P. 24. Courts have relatively broad discretion in assessing timeliness and generally consider four factors: 1) the length of time during which the intervenor knew, or reasonably should have known, of his interest in the case before he petitioned for leave to intervene; 2) the extent of prejudice to existing parties as a result of the intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; 3) the extent of prejudice to the intervenor if the petition is denied; and 4) the existence of unusual circumstances militating either for or against a determination that the application is untimely. *United States v. Jefferson Cty.*, 720 F.2d 1511, 1516 (11th Cir. 1983) (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977)). No one factor is dispositive, and the Eleventh Circuit urges courts to "keep in mind that '[t]imeliness

is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice.'" *Chiles*, 865 F.2d at 1213 (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)). Further, "[t]imeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion . . . ." *Nat'l Ass'n for Advancement of Colored People v. N.Y.*, 413 U.S. 345, 366, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973).

Here, there is no doubt that the Proposed Intervenors' Motion to Intervene is timely. The Plaintiffs filed their Complaint on October 29, 2021, less than 20 days ago. This is a far shorter time period than the Eleventh Circuit has allowed in other cases. In *Omni Healthcare, Inc. v. Health First, Inc.*, 2017 U.S. Dist. LEXIS 136992 (M.D. Fla. 2017), for example, the District Court ruled that a motion to intervene that was filed "twenty-nine months after [CMST's] withdrawal, seven months after the parties settled, and almost four months after the case was dismissed" to be timely. See also *Chiles v. Thornburgh*, 865 F. 2d 1197, 1213 (motion to intervene filed seven months after original complaint, three months after the government filed its motion to dismiss, and before any discovery had begun, was timely).

Moreover, neither the Defendants nor the Plaintiffs will suffer any prejudice from the Proposed Intervenors' Motion to Intervene at this time. The Proposed Intervenors seek to join the case before the parties have fully briefed the issues to the Court. Thus, there is ample time for the Proposed Intervenors to participate in the

merits of the case, without prejudice to the parties. And of course, the Court has not yet ruled on any of the substantive merits in this lawsuit. *See Clean Water Action v. Pruitt*, 315 F. Supp. 3d 72, No. 1:17-cv-00817-DLF, ECF No. 33 (D.D.C. 2018) (granting an applicant's motion to intervene where the court had not yet ruled on any substantive matters in the lawsuit, noting that "intervention will not unduly delay or prejudice the adjudication of the original parties' rights"). The Motion to Intervene is therefore timely under Rule 24(a).

2. The Proposed Intervenors Have a Direct, Substantial Interest in the Implementation of Executive Order 14042.

"[A] party is entitled to intervention as a matter of right if the party's interest in the subject matter of the litigation is direct, substantial and legally protectable." *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002); see also *Loyd v. Alabama Dep't of Corrections*, 176 F.3d 1336 at 1340 (11th Cir. 1999) ("[t]he intervenor must be 'at least a real party in interest in the transaction which is the subject of the proceeding'" (citation omitted)); *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508 at 1512 (11th Cir. 1996) (same). The proposed intervenor is required "to anchor its request in the dispute giving rise to the pending lawsuit . . . [and] demonstrate 'an interest relating to the property or transaction which is the subject of the action.'" *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1246 (11th Cir. 2006) (citation [*36] and emphasis omitted). To determine whether a proposed intervenor possesses the requisite interest for intervention purposes, the Court looks at the subject matter of the litigation. *Georgia*, 302 F.3d at 1251. The inquiry, however, "is 'a flexible one, which focuses on the particular facts and circumstances

surrounding each [motion for intervention].'" *Chiles*, 865 F.2d at 1214 (citation omitted).

The type of "interest" necessary to sustain intervention as of right must be one that is "direct, substantial and legally protectable." *Mt. Hawley Ins. Co. v. Sandy Lake Properties, Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005) (citation omitted). For example, an applicant has a direct and substantial interest under Rule 24(a) in the validity of an agency rule when the rule would affect the applicants' economic status or the way the applicants conduct their business. *See N.Y. Pub. Interest Research Grp. v. Regents of Univ. of N.Y.*, 516 F.2d 350, 351-52 (2d Cir. 1975). Moreover, intervening organizations may properly assert the interests of their members. *See id.* at 352.

Here, the Proposed Intervenors individually and collectively have a strong interest in joining the Plaintiffs' complaint and opposing Executive Order 14042. ABC represents many private construction businesses that regularly bid on and are awarded federal government contracts of the type covered by the unprecedented vaccination mandates imposed by Executive Order 14042, as implemented by the Safer Federal Workforce Task Force Guidance, the Office of Management and Budget, and the Federal Acquisition Regulatory Council, all of which are being challenged in the above-captioned litigation. The Proposed Intervenors will suffer direct adverse impact if the Contractor Mandate is applied to their federal contractor and subcontractor members and their employees. The broad application of the Contractor Mandate is expected to substantially impact each ABC company in that any of their unvaccinated employees must be removed or reallocated to uncovered

workplaces and/or resign their employment, causing ABC's federal contractors to breach their federal contracts by failing to fully comply with the Contractor Mandate. The Contractor Mandate, therefore, forces ABC companies to choose between two equally problematic outcomes: (1) maintain a fully vaccinated (but reduced) workforce of covered employees by firing or suffering resignations of those who are unvaccinated and risk breaching the contracts by not satisfactorily performing due to lack of qualified workers; or (2) breach the contract by continuing to employ unvaccinated, covered employees so that they can timely perform and complete the contract requirements. Either way, ABC companies face a risk of breach and material noncompliance for reasons totally beyond their control.

3. *The Proposed Intervenors' Ability to Protect Their Interests Will Be Impaired Without Intervention.*

"All that is required under Rule 24(a)(2) is that the would-be intervenor be practically disadvantaged by his exclusion from the proceedings." *Huff v. Comm'r of IRS*, 743 F.3d 790, 800 (11th Cir. 2014) (citing *Chiles,* 865 F.2d at 1214). Where an applicant demonstrates a legally protectable interest in the outcome of litigation, courts have frequently found that the applicant also demonstrates that its interests will be impaired without intervention due to the effect of an adverse decision. *See, e.g.*, *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 132 (2d Cir. 2001) ("Appellants have thus satisfied the second requirement for intervention under Rule 24(a)(2). For the same reasons, appellants have also adequately 'demonstrated that the interest may be impaired by the disposition of the action'").

Here, in the event that the Proposed Intervenors cannot intervene and this Court issues an adverse decision, the Proposed Intervenors will have no further recourse. A negative decision would adversely affect the Proposed Intervenors' economic interests. That the Court could decide to uphold Executive Order 14042 without intervention of the Proposed Intervenors does not preclude the Proposed Intervenors from meeting the requirements of Rule 24(a)'s third prong. Indeed, an applicant need not show that "practical harm" "will result": the applicant need only show only that an adverse judgment in the lawsuit at issue would cause the applicant "practical[l] harm." *Home Ins. Co.*,1990 U.S. Dist. LEXIS 15762, at *13 (quoting J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 6.10, at 370). As such, the Proposed Intervenors have demonstrated a sufficient impairment to their interests in the absence of intervention.

4. *The States and Their Governmental Agencies May Not Adequately Represent the Interests of the Proposed Intervenors.*

The fourth requirement for intervention as of right "is satisfied if the proposed intervenor shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Chiles*, 865 F.2d at 1214 (citing *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972)).

This case was filed by the State of Georgia, state agencies, as well as other States. While the interests of the States and their agencies and those of the Proposed Intervenors are aligned, the interests of privately owned businesses such as those that make up ABC's federal contractor members may not be adequately represented

by governmental entities. Courts in other circuits similarly have determined that a government defendant may not adequately represent the economic interests of a private party. *See, e.g.*, *Kleissler v. United States Forest Serv.*, 157 F.3d 964, 973-74 (3d Cir. 1988) ("[T]he government represents numerous complex and conflicting interests in matters of this nature. The straightforward business interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies."); *Earth Island Inst. v. Baker*, 1992 U.S. Dist. LEXIS 8604, at *4 (N.D. Cal. May 6, 1992) ("Moreover, NFI has a strong economic stake in the validity of the challenged governmental action, an interest which the government defendant cannot adequately represent."). Such holdings apply equally to this case. Government entities must consider the interests of multiple stakeholders. Private businesses, in contrast, represent a smaller and more focused group of interested parties. Thus, even where a government plaintiff and a private entity seek the same outcome, it is not surprising that courts often find government entities do not adequately represent the interests of the private parties.

For example, in *Pennsylvania v. President of the United States*, the proposed intervenor, a religious organization, argued that its interests differed from the government's in upholding an executive order. *See* 888 F.3d 52, 61 (3d Cir. 2018). Although the government represented the interests of "nonprofit and for-profit religious objectors, moral objectors, and women seeking access to contraceptive services," the applicant argued that its singular focus on the executive order's moral and religious exemptions entitled it to intervene. *See id.* at 61. The Third Circuit

agreed. *Id.* at 62; *see also Kane City v. United States*, 928 F.3d 877, 894-95 (10th Cir. 2019) (finding that a federal government defendant did not adequately represent the applicant, an environmental organization, because the federal government defendant represented "broad- ranging and competing interests"); *W. Energy Alliance v. Zinke*, 877 F.3d 1157, 1168 (10th Cir. 2017) ("Also, we have held that the government cannot adequately represent the interests of a private intervenor *and* the interests of the public."); *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) ("Applicants seek to secure the broadest possible restrictions on recreational uses in the Study Area to protect its interest in the wilderness character, while the Forest Service has made clear its position that, while the Interim Order does not violate the MWSA, much narrower restrictions would suffice to comply with its statutory mandate.").

For the reasons stated above, the Proposed Intervenors here are unlikely to receive adequate representation from the States and their agencies. The Proposed Intervenors' interests are narrower and more focused than the interests of the state governments and their agencies.

B. Alternatively, this Court Should Permit the Proposed Intervenors to Intervene under Rule 24(b)(1).

If the Court determines that the Proposed Intervenors are not entitled to intervene as of right under Rule 24(a), the Court should alternatively grant permissive intervention under Rule 24(b). If a nonparty lacks the right to intervene, Rule 24(b) allows the court to grant it permission to do so "when a statute of the United States confers a conditional right to intervene," or "when [the] applicant's

claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b); see also *Chiles*, 865 F.2d at 1213.

In evaluating whether to permit intervention under Rule 24(b), courts look to whether (1) the motion is timely; (2) the claims or defenses share a common question of law or fact with the main action. *See New York v. Azar*, 2019 U.S. Dist. LEXIS 129498, at *26 (S.D.N.Y. Aug. 2, 2019). A proposed intervenor must have a defense that shares a common question of law or fact with the main action. Fed. R. Civ. P. 24(b)(1)(B). This common question requirement is generally given a liberal construction. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977) (citations omitted). When the proposed intervenor will assert the same claims as those of an existing party, the common question requirement is met. *Davis. v. Southern Bell Tel. & Tel. Co.*, 149 F.R.D. 666, 670 (S.D. Fla. May 27, 1993).

The Proposed Intervenors satisfy the test for permissive intervention. First, as discussed above, the Proposed Intervenors' Motion to Intervene is timely. Second, the arguments that the Proposed Intervenors wish to present, basically, that the Contractor Mandate is not a lawful exercise of the federal government's powers—share common questions of law and fact with the current plaintiffs. Moreover, the expertise being brought to bear on this issue by the broad-based business groups representing the many diverse business interests of their members will benefit the Court and assist it in addressing the primary questions in this lawsuit.

Therefore, this Court should exercise its discretion to permit the Proposed Intervenors to intervene, even if it determines that they are not entitled to intervene as of right.

III. CONCLUSION

For all of the reasons set forth above, the Proposed Intervenors respectfully request that the Court grant this Motion and permit the Proposed Intervenors to intervene in the underlying lawsuit.

Respectfully Submitted this 18th day of November 2021.

/s/ Kathleen J. Jennings
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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2021, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ J. Larry Stine
J. Larry Stine

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ATTACHMENT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

THE STATE OF GEORGIA, et al., *Plaintiffs,* ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC. and ASSOCIATED BUILDERS AND CONTRACTORS, INC., *Plaintiffs/Intervenors,* v. JOSEPH R. BIDEN in his official capacity as President of the United States; et al., *Defendants.*	)	Case 1:21-cv-00163-RSB-BKE

DECLARATION OF BILL ANDERSON
IN SUPPORT OF PRELIMINARY INJUNCTION

I, Bill Anderson, being duly sworn, hereby state the following based on personal knowledge;

1. I am the President & CEO of Associated Builders and Contractors of Georgia, Inc. ("ABCGA"), [one of the plaintiffs in the above-captioned case] OR [Intervenor-Movant in the above captioned case].

2. Based in Atlanta, ABCGA represents the interests of hundreds of member construction contractors and related firms from all over Georgia, who perform work in this state and throughout the country. ABCGA's membership

represents most specialties within the construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

3. ABCGA is a chartered chapter of Associated Builders and Contractors, Inc. ("ABC") national construction industry trade association, representing more than 21,000 member contractors and related firms all over the country. ABCGA and ABC as a whole strongly support and encourage vaccination of construction workers, and many ABC member companies have made significant efforts through outreach and incentives to get as many workers as possible vaccinated. But a sizable percentage of construction workers, as with the population as a whole, resist compulsory vaccination and have indicated they will quit their employment rather than submit to mandatory vaccination.

4. ABCGA and ABC as a whole represent many private businesses that regularly bid on and are awarded federal government contracts of the type covered by the unprecedented vaccination mandates imposed by Executive Order 14042, as implemented by the Safer Federal Workforce Task Force Guidance, the Office of Management and Budget, and the Federal Acquisition Regulatory Council, all of which are being challenged in the above-captioned litigation.

5. More specifically, absent preliminary injunctive relief staying the unlawfully promulgated Order and regulations at issue here, many ABCGA and ABC members will be compelled as a condition of award of any contracts after November 14, 2021 to ensure that all "covered contractor employees" are fully vaccinated, including employees "who are not themselves working on or in connection with a

covered contract."[1] The vaccination mandate applies even to persons who have already been infected with COVID-19, or who work exclusively in outdoor workplace locations, or who work full time on a remote basis.

6. The challenged mandate is being imposed on federal contractors in a manner inconsistent with the recently issued OSHA Emergency Temporary Standard (ETS), in ways that adversely affect many members of ABCGA and ABC. Specifically, many members of the association(s) who perform federal contracts and subcontracts employ fewer than 100 employees, a number which according to OSHA renders such employers unlikely to be able to comply with mandatory vaccination requirements.[2] The majority of ABC members are classified as small businesses. Indeed, construction companies employing fewer than 100 workers compose 99% of construction firms in the United States, accounting for 68% of all construction industry employment.[3] In addition, the federal contractor mandate allows no testing option for unvaccinated employees, contrary to the OSHA ETS.

7. The challenged federal contractor mandate allows exemption from its vaccination requirements only for employees who qualify as suffering from vaccine-related disabilities, and those who qualify for a religious exemption. But the Task Force Guidance and FAR Clause are inadequate for the needs of employers

[1]https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf (last visited Nov. 10, 2021).

[2] 86 Fed. Reg. 61,403 (Nov. 5, 2021) (expressing OSHA's lack of confidence that smaller employers "have the administrative capacity to implement the standard's requirements….")

[3] U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019.

attempting to determine what employees are exempt from the mandate or what accommodations to make for such exempt status.

8. Many ABCGA and ABC members who regularly bid on and are awarded government contracts covered by the challenged contractor mandate will be irreparably harmed in the absence of injunctive relief to prevent its implementation. First, if the contractors do not acquiesce to the challenged mandate, they will be disqualified from bidding on or being awarded work on covered federal contracts beginning November 14, 2021. According to recent data posted on the government website www.usaspending.gov, ABC member general contractors compose a crucial segment of the construction industry's federal contracting base[4] as ABC members won 57% of the $118 billion in direct federal U.S. construction contracts exceeding $25 million awarded during fiscal years 2009-2020.[5] Of this amount, a significant share was awarded to and built by members of ABCGA.

9. If contractors are forced to comply with the challenged mandate in order to be awarded covered federal contracts, many of them will be unable to perform the awarded contracts because a significant percentage of their vaccine-resistant workers will quit or have to be placed on extended leaves of absence rather than be vaccinated. According to published reports, there is already a shortage of 430,000 construction

[4] According to the U.S. Census Bureau (accessed Sept. 15, 2021), there was roughly $30 billion in federal construction put in place in 2020 https://www.census.gov/construction/c30/historical_data.html

[5] USASpending.gov data (accessed Dec. 22, 2020) cross-referenced with ABC membership. This data does not account for ABC members who performed subcontracting work on federal construction jobsites as that subcontractor information is not available on USASpending.gov or other government resources. However, the percentage of government work performed by ABC subcontractors is as high as or higher than the percentage of general contractor work, particularly when amounts below $25 million are included, as they would be under the new mandate.

workers needed to fulfill existing demands for construction in the U.S.[6] The shortage is expected to grow larger as a result of the recently passed Infrastructure Bill. If even a small percentage of the existing construction workforce ceases employment due to the vaccine mandate, exacerbating the existing shortage, then the much-needed construction projects of the federal government will not be capable of performance. It is also well known that construction industry workforces are uniquely transitory and temporary, compared to other industries. Any vaccine-resistant worker who wants to avoid vaccination as a condition of employment by a government contractor, can readily obtain employment by a contractor who does not perform government contracts, and/or is not covered by the OSHA ETS mandate or test policy, particularly during the current labor shortage.

10. For each of these reasons, the challenged federal contractor mandate is likely to increase costs and undermine economy and efficiency in federal contracting. An August 2021 ABC survey of its federal contractor members found that 77 of survey respondents said vaccine mandates will increase costs on federal construction projects. Just 1.2% of respondents said vaccine mandates will decrease costs. In addition, the survey results indicated that a vaccine mandate on federal contractor employees would decrease competition for government contracts, with 49% of survey participants saying they would be less likely to bid on federal contracts subjected to vaccine requirements.

[6] The Construction Industry Needs to Hire an Additional 430,000 Craft Professionals in 2021, March 23, 2021, ABC News Release.

I have reviewed the foregoing and hereby swear under penalties of perjury that it is true and correct.

Dated this 17th day of November 2021.

Bill Anderson